ING MERCHANT BANK (SINGAPORE) LTD & ANOR

v.

DATO' MOHAMED ANUAR EMBONG

COURT OF APPEAL, KUALA LUMPUR
SHAIK DAUD ISMAIL JCA
ABDUL HAMID MOHAMAD JCA
ABDUL KADIR SULAIMAN JCA
[CIVIL APPEAL NO: W-02-421-00]
16 JULY 2001

CIVIL PROCEDURE: *Writ of summons - Striking out application - Grounds - Lack of jurisdiction - Forum non conveniens - Res judicata - Whether successfully raised*

EVIDENCE: *Fresh or further evidence - When admissible - Principle in Ladd v. Marshall*

The respondent served a notice and a writ of summons out of jurisdiction upon the appellants. The appellants entered conditional appearance followed with the filing of a summons in chambers to set aside the said notice and writ on lack of jurisdiction, and alternatively, on *forum non conveniens*. The senior assistant registrar ('SAR') dismissed the said summons. The appellants' appeal to the judge in chambers was also dismissed. The appellants now appealed to this court and applied for leave to adduce further evidence by way of two affidavits to be affirmed by one Tan Hin Huat and one Lawrence Lee Mun Kong at the hearing of the appeal.

The appellants claimed that there were two witnesses for the appellants who were citizens and residents of Singapore. The two witnesses had since left the service of the 1st appellant and therefore could not be instructed to give evidence for them. It followed, therefore, that Singapore was the *forum conveniens* to try the action brought by the respondent. The appellants also raised the issue of *res judicata, ie*, that the same issues and matters in the respondent's suit had already been raised, litigated and finally decided upon in the 1st appellant's suit against the respondent in Singapore.

Held:
Per Abdul Kadir Sulaiman JCA

[1] From the evidence, there was no certainty that the two witnesses would testify for the appellants if the trial was to be conducted in Singapore.

[2] In order for fresh evidence to be admissible, three conditions must be fulfilled as laid down in *Ladd v. Marshall*. Firstly, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial. Secondly, the evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive. Thirdly, the evidence must be such as is presumably to be believed or in other words, it must be apparently credible, though it need not be incontrovertible. The three conditions are cumulative and conjunctive and not disjunctive in that all the conditions must be fulfilled in order for the fresh evidence to be admissible.

[2a] The fresh evidence sought to be adduced could have been brought before the SAR. The appellants' reasoning that it did not occur to them at that material time that the two witnesses were necessary witnesses for them was not acceptable. The appellants were put on notice concerning those two witnesses. If they chose to ignore the importance of the two witnesses then, it was too late to proffer that evidence now.

[2b] Even if the appellants met the first condition required in *Ladd v. Marshall*, the appellant could not succeed on the second condition, *ie*, that the said evidence if given would have an important influence on the result of the application of the appellants before the SAR or for that matter before the learned judge on appeal in chambers on the issue of *forum non conveniens*. That was because even if the trial was conducted in Malaysia, the arm of the law was long enough to compel their attendance to give evidence in the Malaysian court notwithstanding that they were citizens and residents of Singapore.

[3] Based on the pleadings of the respondent, the representations alleged against the appellants were made by the appellants' representatives while in Malaysia and the respondent had never visited the appellants' office in Singapore. The cause of action was clearly in Malaysia. Therefore, the claim of the respondent should be tried in Malaysia.

[4] The appellants' application before the SAR did not seek to set aside the notice and the writ on the ground of *res judicata*. Although the grounds given for the seeking of the relief mentioned *res judicata*, it could not form the basis of the appellants' application to set aside the notice and the writ of the respondent on the ground of *res judicata* as there was no such prayer in the application before the SAR.

[5] Raising the issue of *res judicata* now was an attempt to introduce new evidence. But that new evidence would not satisfy the requirements laid down in *Ladd v. Marshall* because it was available at the hearing of the summons before the SAR although it did not form part of the prayers therein. In any event, *res judicata* would not apply to the 2nd appellant because he was not a party in the Singapore suit brought against the respondent.

[6] The proposed affidavit of one Lawrence Lee Mun Keong could not be allowed for two reasons. Firstly, the said deponent being the solicitor for the 1st appellant in the Singapore suit was not an independent person whose evidence could be taken into consideration. Secondly, for the reasons given earlier, the issue of *res judicata* was not before the SAR or the learned judge and that new evidence was one which fell outside the ambit of the principle in *Ladd v. Marshall*.

[7] The issue of *forum non conveniens* was not the subject matter for which the conditional appearance was granted to the appellants. Therefore, the appellants were not allowed to bring the said issue. To allow them to do so would amount to allowing them to pursue a matter where no prior leave was sought or granted as a condition for entering conditional appearance in the suit.

[Appeal dismissed.]

*[**Bahasa Malaysia** Translation Of Headnotes]*

Responden telah menyerahkan suatu notis dan writ saman luar bidangkuasa ke atas perayu-perayu. Perayu-perayu memasukkan kehadiran bersyarat diikuti dengan pemfailan suatu saman dalam kamar untuk mengenepikan notis dan writ saman tersebut berdasarkan tidak ada bidang kuasa, dan secara alternatif, berdasarkan *forum non conveniens*. Penolong Kanan Pendaftar ('PKP') telah menolak saman tersebut. Rayuan perayu-perayu kepada hakim dalam kamar pun ditolak. Perayu-perayu kini merayu kepada mahkamah ini dan memohon kebenaran untuk mengemukakan keterangan tambahan melalui dua afidavit yang diikrarkan oleh Tan Hin Huat dan Lawrence Lee Mun Kong masing-masing di perbicaraan rayuan ini.

Perayu-perayu menuntut bahawa ada dua orang saksi untuk perayu-perayu, yang berwarganegara dan menetap di Singapura. Kedua-dua saksi tersebut tidak lagi berkhidmat dengan perayu pertama dan dengan itu tidak boleh diarahkan untuk memberi keterangan bagi mereka. Maka ini bermakna bahawa Singapura adalah *forum conveniens* untuk tindakan ini dibicarakan. Perayu-perayu juga membangkitkan isu *res judicata*, iaitu bahawa isu-isu dan perkara-perkara yang

sama dalam guaman responden telah pun dibangkitkan, dimenandingi dan akhirnya di putuskan di dalam guaman perayu pertama terhadap responden di Singapura.

Diputuskan:
Oleh Abdul Kadir Sulaiman HMR

[1] Berdasarkan keterangan tidak ada kemungkinan bahawa kedua-dua saksi tersebut akan menghadiri untuk memberikan keterangan bagi perayu-perayu jika perbicaraan diadakan di Singapura..

[2] Untuk keterangan baru diterima, tiga syarat perlu dipenuhi sebagaimana yang diputuskan di *Ladd lwn. Marshall*. Pertamanya perlu ditunjukkan bahawa keterangan tersebut tidak boleh diperolehi dengan kerajinan munasabah untuk digunakan dalam perbicaraan. Keduanya, keterangan tersebut, sekiranya digunakan, mungkin mempunyai pengaruh besar keatas keputusan kes, sekalipun ianya bukan yang menentukannya. Ketiganya, keterangan seumpama itu perlu dianggapkan mempunyai kemungkinan untuk dipercayai atau dalam perkataan lain, kelihatan munasabah, sekalipun takmemperdebatkan. Ketiga-tiga syarat tersebut adalah kumulatif dan berkaitan dan bukan berasingan. Kesemua syarat tersebut perlu dipenuhi supaya keterangan baru boleh diterima.

[2a] Keterangan baru yang cuba dikemukakan mungkin boleh dibawa kehadapan PKP. Taakulan perayu-perayu bahawa pada masa material itu tidak terlintas pada akal mereka bahawa kedua-dua saksi adalah saksi-saksi yang penting, tidak boleh diterima. Perayu-perayu telah diberi perhatian mengenai kedua-kedua saksi itu. Sekiranya mereka memilih untuk tidak mengendahkan kepentingan kedua-dua saksi pada masa itu, maka ianya terlambat untuk mengemukakan keterangan tersebut kini.

[2b] Meskipun perayu-perayu memenuhi syarat pertama dalam *Ladd lwn. Marshall* perayu-perayu tidak boleh berjaya memenuhi syarat kedua iaitu, bahawa keterangan sekiranya dikemukakan akan mempunyai pengaruh besar keatas keputusan permohonan perayu-perayu di hadapan PKP ataupun di hadapan hakim yang arif di rayuan dalam kamar mengenai isu *forum non conveniens*. Itu adalah kerana meskipun perbicaraan dijalankan di Malaysia, undang-undang boleh memastikan kehadiran mereka untuk memberikan keterangan di dalam mahkamah di Malaysia walaupun mereka adalah warganegara Singapura.

[3] Berdasarkan pliding-pliding responden, tuntutan terhadap perayu-perayu yang digambarkan dibuat oleh wakil perayu-perayu ketika di Malaysia dan responden tidak pernah mengunjung pejabat perayu-perayu di Singapura. Kausa tindakan sepatutnya di Malaysia. Oleh kerana itu, tuntutan responden harus dibicarakan di Malaysia.

[4] Permohonan perayu-perayu di hadapan PKP tidak meminta mengenepian notis dan writ berdasarkan *res judicata*. Meskipun alasan-alasan yang diberikan untuk mendapatkan relif menyebut *res judicata*, itu tidak menjadi dasar permohonan perayu-perayu untuk mengenepikan notis dan writ responden berdasarkan *res judicata* oleh kerana tidak ada permohonan seumpama itu di dalam permohonan di hadapan PKP.

[5] Menimbulkan isu *res judicata* pada ketika ini adalah suatu percubaan untuk mengemukakan keterangan baru. Akan tetapi keterangan baru itu tidak akan memenuhi keperluan sepertimana dikehendaki di *Ladd lwn. Marshall* oleh kerana ianya sudah ada pada masa perbicaraan saman di hadapan PKP walaupun ia bukan sebahagian permohonan disitu.

[6] Afidavit cadangan oleh Lawrence Lee Mun Keong tidak boleh dibenarkan atas dua alasan. Pertamanya deponen tersebut adalah peguam bagi pihak perayu pertama di dalam guaman Singapura dan merupakan seseorang yang tidak bebas di mana keterangannya boleh dipertimbangkan. Keduanya, oleh kerana alasan yang diberikan sebelum ini, isu *res judicata* tidak ditimbulkan di hadapan PKP atau hakim yang arif dan keterangan baru ini jatuh di luar bidang kuasa prinsip *Ladd lwn. Marshall*.

[7] Isu *forum non conveniens* tidak dijadikan hal yang dibincangkan apabila perayu-perayu dibenarkan memasukkan kehadiran bersyarat. Jadi, perayu-perayu tidak dibenarkan membawa isu tersebut. Sekiranya mereka dibenarkan menimbulkan isu tersebut maka ia bermaksud bahawa mereka dibenarkan menuntut suatu hal di mana kebenaran terlebih dahulu tidak dipohonkan atau diberikan untuk memasukkan kehadiran bersyarat di dalam guaman ini.

[Rayuan ditolak.]

Case(s) referred to:

Goodstock (Nominees) Sdn Bhd v. Lean Land Sdn Bhd & Ors [1991] 1 CLJ 696; [1991] 1 CLJ (Rep) 600 ***(refd)***

Ladd v. Marshall [1954] 1 WLR 1489 ***(foll)***

Perbadanan Pengurusan Taman Bukit Jambul v. Perbadanan Pembangunan Bandar & Ors [1997] 1 CLJ Supp 501 ***(refd)***

U Viswalingam v. S Viswalingam [1980] 1 MLJ 10 ***(foll)***

For the appellants - YM Raja Aziz Addruse (Christopher Leong & Edmund Bon); M/s Chooi & Co

For the respondent - RR Sethu (B Thangaraj); M/s Thangaraj & Assoc

Reported by Usha Thiagarajah

JUDGMENT

Abdul Kadir Sulaiman JCA:

On 29 September 1999, the respondent caused a notice of writ of summons and the writ itself to be issued and served on the appellants out of jurisdiction in Civil Suit No. S2-22-546-1999 for breach of an oral representation made on behalf of the 1st appellant. On 5 November 1999 both the appellants entered conditional appearance. Following that on 18 November 1999 they filed a summons in chambers to set aside the said notice and the writ on the ground that the court here has no jurisdiction to try the action brought against them. As an alternative, they sought a stay of all further proceedings in the action on the ground that the court is not the *forum conveniens*.

The said summons in chambers of the appellants was heard by the learned senior assistant registrar who gave the decision on 14 February 2000 dismissing it. Dissatisfied with the decision, the appellants appealed to the judge in chambers. After hearing the appellants' appeal, on 28 April 2000 the learned judge dismissed the said appeal on both grounds of jurisdiction and forum and ordered the appellants to file their statements of defence on or before 22 May 2000. Dissatisfied with that decision of the learned judge, the appellants now appeal to this court.

While waiting for the appeal to be heard, the appellants on 10 August 2000 filed a notice of motion praying that the appellants be given leave to adduce further evidence at the hearing of the appeal by way of the filing and reading of two affidavits to be affirmed by Tan Hin Huat and Lawrence Lee Mun Kong. The said two affidavits were exhibited in the application.

In the proposed affidavit of Tan Hin Huat, in support of *forum non conveniens* issue, it is deposed that the two witnesses for the appellants who are citizens and residents of Singapore, have since left the service of the first appellant, one on 18 January 1996 and the other on 30 November 1996. Having left the service of the 1st appellant, therefore, they cannot be instructed by the 1st appellant to give evidence in any suit against it and that no subpoena issued by a court in this jurisdiction may be affected against them in Singapore. Hence, Singapore is the *forum conveniens* to try the action brought by the respondent here. In support, the deponent exhibited letters sent to the two witnesses seeking their cooperation to attend as witnesses in the trial of the suit instituted by the respondent in Malaysia. Both received the communication but did not respond. As for Evelyn Teah, she responded over the phone that she would not attend court in Malaysia as a witness. The proposed affidavit of Tan Hin Huat also raises the issue of *res judicata* contending the same issues and matters in the respondent's suit against the appellants have already

been raised, litigated and finally decided upon in the 1st appellant's Suit No. 454 of 1998 brought against the respondent in the Singapore High Court. On 7 October 1998 the Singapore High Court granted leave to the respondent to defend the action upon provision of security in the sum of RM2,000,000 by way of a banker's guarantee drawn in favour of the 1st appellant's solicitors or nominees in Malaysia by 4 November 1998. In the event of the respondent's failure to comply with the aforesaid order, the defence be struck out and interlocutory judgment be entered without further order against the respondent with damages to be assessed. The respondent failed to comply with the terms of the said order and on 13 November 1998, an interlocutory judgment was entered against him by having his defence struck out and he was ordered to pay the first appellant damages to be assessed and interest at 2% per annum above the first appellant's cost of funds from 11 November 1997 to the date of actual payment and solicitor and client costs. On 13 April 2000 a final judgment was entered against the respondent in the sum of RM9,412,742.98, interest at 2% per annum above the 1st appellant's cost of funds on the sum at monthly rest from 1 November 1997 to 31 August 1998 amounting to RM1,168,716.65, interest at 6% per annum on the above capital sum from 1 September 1998 to the date of judgment ie, 13 April 2000 amounting to RM912,907.12 and the solicitor-client costs to be taxed or agreed. The respondent, however, appealed only against the award of the 6% interest mentioned above. His appeal was allowed. On those grounds the appellants contend that the present suit of the respondent filed in Malaysia is *res judicata* as the Singapore proceedings have finally decided and disposed of the matters between the parties.

For Lawrence Lee Mun Kong, the proposed affidavit to be filed and read at the hearing of the appeal proper before us deposed that he was the solicitor having conduct, on behalf of the 1st appellant of the Singapore Suit No. 454 of 1998. He then went on to express his views as to the finality of the judgment obtained against the respondent in the Singapore Court mentioned earlier.

At the hearing of this motion of the appellants, having considered the matter and having heard the submissions put forward on either side, we dismissed it with costs and we now provide our reasons for it. On the issue that this suit of the respondent against both the appellants be more conveniently tried in Singapore, the evidence in question consists of the letters emanating from the 1st appellant to its two ex-officers suggesting to them to be witnesses for the appellants in the trial of the present suit of the respondent in Malaysia and the reply of one of them of her unwillingness to do so. By this the appellants are suggesting that if the trial is to be conducted in Singapore, these witnesses would be available there to testify for the appellants in the suit. However, from

the evidence, there is no certainty that they would do so. Koo Kim Leong did not respond at all to the suggestion of the appellants and as regard Evelyn Teah according to the evidence relating to the telephone conversation had with her on 26 July 2000, she would not attend court in Malaysia as a witness but there is no evidence that she was prepared to do so if the trial is held in Singapore. So the position is neither here nor there. But of paramount consideration is whether this evidence in the proposed affidavit of Tan Hin Huat on this issue, is that which is admissible as a piece of fresh evidence to be used in the hearing of the appeal proper. In order for it to be admissible for the purpose, that evidence must fall within the principle laid down in *Ladd v. Marshall* [1954] 1 WLR 1489 where at p. 1591 Lord Denning said:

> To justify the reception of fresh evidence or a new trial, three conditions must be fulfilled: first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial; secondly, the evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive; thirdly, the evidence must be such as is presumably to be believed or in other words, it must be apparently credible, though it need not be incontrovertible.

The said three conditions are cumulative and conjunctive and not disjunctive in that all the conditions must be fulfilled in order for the fresh evidence to be admissible for the purpose. Here, on the first condition itself we are of the view that the appellants have failed. Though the communication took place after the decision of the learned judge, but that evidence could have been obtained earlier even immediately after the service of the notice and the writ of the respondent upon them. If this was done that nature of evidence could have been brought out before the learned senior assistant registrar hearing the summons in chamber of the appellants for the striking out of the notice and the writ of the respondent. According to the learned counsel for the appellants, at the material time it did not occur to them that these two witnesses were necessary witnesses for them. It is only now that it is thought that they were necessary but they would not come up to Malaysia to testify. That reasoning cannot at all be acceptable because in the first place the respondent's suit is founded on a course of dealings with the appellants through their representatives, the two persons involved, expressly named in the statement of claim of the respondent. The appellants are put on notice concerning these two persons. If they chose to ignore the importance of these two persons in support of their case against the allegation by the respondent, it is too late now to proffer that evidence relating the two persons by way of fresh evidence. On the other hand even if the appellants meet the first conditions required in *Ladd v. Marshall, supra*, it is our view that the appellant cannot succeed on the second condition which is that the evidence as contained in the proposed affidavit Tan Hin Huat, if given, would have an important influence on the

result of the application of the appellants before the learned senior assistant registrar or for that matter before the learned judge on appeal in chambers on the issue of *forum non conveniens*. This is because even if the trial is conducted in Malaysia, the arm of the law is long enough to compel their attendance to give evidence in the Malaysian Court notwithstanding that they are citizens and residents of Singapore. According to the pleadings of the respondent, the representations alleged against the appellants were made by their representatives while in Malaysia and the respondent has never visited the appellants office in Singapore. The course of action is clearly in Malaysia and therefore, the claim of the respondent ought properly to be tried in Malaysia and it follows that the *forum conveniens* can never be anywhere else than in Malaysia. It is not the convenience of the two persons that we are concerned here. For the purpose of this motion of the appellants we agree with the views expressed by the learned judge in his grounds of decision. Therein the learned judge said:

> Since the plaintiff's (respondent's) claim filed in this Court is based on the representations made between the 1st defendant's (appellant's) representatives and the plaintiff and since a new party, namely, the 2nd defendant (appellant), is also being included (although there is no separate relief sought against the 2nd defendant), and since the plaintiff has never visited the defendants' offices in Singapore, I am of the view that this claim ought properly to be heard in Malaysia and I hold that this Court is the proper *forum conveniens*. The plaintiff resides in Malaysia and the shares complained of, namely shares of North Borneo Timber Berhad, Seng Hup Electric Company Berhad and S & P Food Industries are all quoted in the Kuala Lumpur Stock Exchange, which are within this Court's jurisdiction. Further the Expirit Corporation Sdn Bhd whose shares the defendants were to have taken over and in respect of which the plaintiff had signed the call option agreement in favour of the 1st defendant, is registered in Malaysia. Further the witnesses for the plaintiff would be from Malaysia and the defendant's witnesses Koo and Teah are all too familiar with Malaysia.

Next on the issue of *res judicata*, Tan Hin Huat by his proposed affidavit to be filed and read at the hearing of the appeal proper reiterates that the same issues and matters in the respondent's suit in question has already been raised, litigated and finally decided upon in the 1st appellant's suit against the respondent in the Singapore case. He listed out the events respecting the interlocutory judgment obtained against the respondent as mentioned earlier. However, looking at the application of the appellant before the learned senior assistant registrar, it sought for the setting aside of the notice and the writ of the respondent for no or lack of jurisdiction of the court to hear the suit and in the alternative, it sought that the matter be adjourned on the ground of *forum non conveniens*. The said application did not seek to set aside the notice and

the writ on the ground of *res judicata*. The grounds given for the seeking of the relief, however, include the mention of *res judicata*. They are to be found at paras (b) and (c) thereof as follows:

> (b) The Plaintiff (the respondent) has filed his Defence in the case High Court Civil Suit No. 454 Year 1998 which was filed in the Republic of Singapore in which the First and Second Defendants have obtained an interlocutory judgment on the 13th November, 1998 in respect of/arose from the same transaction and due to that the Plaintiff has submitted himself to the jurisdiction of the High Court of the Republic of Singapore, therefore matter is *Res Judicata*;
>
> (c) it is an abuse of the process of the Court to file a proceeding in this Honourable Court and to raise similar issues which have already been dealt with in High Court Civil Suit No. 454 1998 which has been filed in the Republic of Singapore which is the *'forum conveniens'*;

These so called grounds, therefore, cannot form the basis to treat the application of the respondent as an application to set aside the notice and the writ of the respondent on ground of *res judicata* because there is no prayer for such in the application before the senior assistant registrar. Raising it now through the intended affidavit of Tan Hin Huat is indeed an attempt to introduce new evidence. But this new evidence would not satisfy the requirements laid down by *Ladd v. Marshall, supra,* because this piece of evidence was available even at the time when the hearing of the summons before the learned senior assistant registrar but it did not form part of the prayers in the summons which concern only the issue of jurisdiction and *forum non conveniens*. In any event, *res judicata* would not apply to the second appellant because he was not a party in the Singapore suit brought against the respondent.

Be that as it may, in the present application before us it sought leave to file and read the proposed affidavit of, *inter alia*, Lawrence Lee Mun Keong. According to the proposed affidavit, the deponent was and is the solicitor having conduct on behalf of the 1st appellant in the Singapore suit brought by the 1st appellant against the respondent. The substance of it relates to his views on the law of Singapore concerning the position of the Singapore suit *viz a viz* the interlocutory judgment entered against the respondent there on 13 April 2000. For two reasons, we are of the view that this part of the relief sought pertaining to the proposed affidavit cannot be allowed. Firstly, being solicitor for the 1st appellant in the Singapore suit the deponent is not an independent person whose evidence as contained in the proposed affidavit could be taken into consideration by the court: see *U. Viswalingam v. S. Viswalingam* [1980] 1 MLJ 10. In that case, the expert giving evidence on Muslim law in

Malaysia was acting as a legal adviser to the respondent in a dissolution of marriage petition brought by the wife petitioner. Ormroad LJ sitting in the English Court of Appeal on the appeal brought by the respondent in the court below said at p. 20:

> Surprisingly, it (the Fatwa) was obtained by Dr. Yaacob himself, then acting as legal adviser to the husband, so that the learned judge did not have the advantage of hearing a truly independent expert on Muslim law in Malaysia. Moreover, the Fatwa itself appears to have been based upon an assertion, put forward in the first place by Dr. Yaacob, which the wife has had no opportunity of challenging. ... For these reasons we are not prepared to recognise that the wife in this case had ceased to be the wife of the husband at the date when she presented her petition to this court.

Secondly, for the reason given earlier, the issue of *res judicata* was not before the learned senior assistant registrar or the learned judge and this new evidence, was one which fall outside the ambit of the principle in *Ladd v. Marshall, supra,* as explained earlier when dealing with the proposed affidavit of Tan Hin Huat. So, this proposed affidavit of the deponent would not be of any assistance to this court dealing with the substantive appeal of the appellant.

Having disposed with this matter of the application of the appellants, we embark to consider the appeal proper. The appeal is against the decision of the learned judge dismissing the appeal from the decision of the learned senior assistant registrar dismissing the application of the appellants to have the notice and the writ of the respondent set aside. The application before the learned SAR was by way of a summons in chambers dated 18 November 1999 praying for the setting aside of the notice and the writ of summons of the respondent and in the alternative, for a stay of all further proceedings in the action of the respondent. This application arose out of the conditional appearance granted to the appellants by the court for the sole purpose of the appellants challenging the jurisdiction of the court to hear the suit of the respondent. However, in the said summons in chambers, instead of confining themselves to the reason for the granting of the conditional appearance, the appellant ventured on another alternative ground that the court is not the *forum conveniens* to try the suit of the respondent here, which tacitly admitting to the jurisdiction of the court here but for legal convenience, the suit ought to be tried in Singapore. This ground of application is not the subject matter for which the conditional appearance was granted to the appellants.

So, at the hearing of the appeal, the learned counsel for the respondent pointed out that the appellants are to be excluded from bringing in the issue of *forum non conveniens* for to allow them to do so would amount to allowing them to pursue on a matter wherein no prior leave was sought or granted as a condition for entering conditional appearance in the suit. We were referred to

Goodstock (Nominees) Sdn. Bhd. v. Leen Land Sdn. Bhd. & 4 Ors. [1991] 1 CLJ 696 and *Perbadanan Pengurusan Taman Bukit Jambul v. Perbadanan Pembangunan Bandar & Ors.* [1997] 1 CLJ Supp 501 as authorities in support of the contention of the learned counsel. To this submission we agreed, as otherwise the whole matter would be at large even embracing those grounds not covered by the grant of the conditional appearance.

Before us, the learned counsel for the appellants submitted that by the various agreements entered into between the parties, they have agreed that in the event of a dispute they would submit to the jurisdiction of Singapore. We are not impressed by that submission because, the present suit of the respondent has no relationship to the various agreements earlier on entered into between the parties but was grounded upon a series of dealings which transpired between the appellants' representatives, namely, one Mr. Koo Kin Leong, the Associate Director of the first appellant and Ms. Evelyn Teah, and the respondent in Malaysia. The entire dealings were concluded in Malaysia. The respondent's case which is the subject matter of this appeal has nothing to do with the various agreements which was the subject matter of an earlier Singapore suit taken up by the first appellant against the respondent in Singapore High Court. The present suit of the respondent was premised on a cause of action in Malaysia arising out of the various representations allegedly made by the representatives of the appellants in Malaysia.

Also, before us the learned counsel for the appellants conceded that the procedure adopted in filing the summons in chambers for the setting aside of the notice and the writ of the respondent was wrong in the sense that in one breath it is an attack on the jurisdiction of the court and in another breath it is an attack on the forum to try the action. However, he said there is no question that the parties and the court were under the impression that it was on the ground of *res judicata* or *forum non conveniens.* Again, we are not impressed by this submission. The appellants should have confined themselves on the issue for which the conditional appearance was granted instead of approbating and reprobating in the matter. For that reason we unanimously agree that this appeal be dismissed on procedural ground with costs. We also ordered that the deposit be credited to the account of taxed costs.